JMM v Republic (Criminal Appeal E040 of 2021)
[2024] KEHC 14030 (KLR) (25 September 2024) (Judgment)

Neutral citation: [2024] KEHC 14030 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL APPEAL E040 OF 2021

GL NZIOKA, J

SEPTEMBER 25, 2024

BETWEEN

JMM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the decision of Hon. Esther Mburu Senior Resident Magistrate (SRM) delivered on; 17th November, 2021, vide Chief Magistrate's Criminal case S/O No. 76 of 2018)

JUDGMENT

1. The appellant was arraigned before the Chief Magistrate's court charged vide Chief Magistrate's Criminal Case S/O No. 76 of 2018, with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offence *Act No. 3 of 2006* (herein "the Act)".

2. The particulars of the charge are that on the 22nd day of September 2018 within Nakuru County, unlawfully and intentionally did cause his genital organ namely penis to penetrate the genital organ namely vagina of JW a girl aged 3½ years old (herein "the complainant").

3. The appellant is also charged in the alternative count with the offence of indecent act with a child contrary to section 11(1) of the Act.

4. The particulars of the alternative count states that on 22nd day of September 2018 within Nakuru County, unlawfully and intentionally did cause his genital organ namely penis to come into contact with the genital organ namely vagina of JW a girl aged 3½ years old.

5. The charges were read to him and he pleaded not guilty to both counts and the case proceeded to full hearing. The prosecution case is that from as early age of six (6) months the complainant was staying with her aunt (PW2) MW

6. That the complainant's mother was staying with the appellant who was her friend and step-father to the complainant. It is in evidence that the complainant's mother and aunt were staying in the same plot but in different house.

7. According to the evidence of the complainant's aunt (PW2) walking, on the material date, the complainant left the house to go and play with the other children and then proceed to her mother's house.

8. That when the complainant returned home her aunt noticed that her trouser was not zipped and she was walking with her legs apart.

   That her aunt questioned the complainant as to what had happened and the complainant told her that, the appellant whom she identified as "Maina" had done something in between her legs pointing at her private parts. That she checked the complainant's private part and noticed it was swollen and oil had been applied thereon. That she took the complainant to hospital for medical examination.

9. According to the evidence of PW3 Dr. Benjamin Kuria, the medical examination revealed that the complainant's hymen was partially broken.

10. It is in evidence that the appellant was traced by arrested thereafter by members of the public and rescued from mob justice by PW4 No. 8xxx6 Corporal Elizabeth Lepetet, the investigation officer and charged accordingly.

11. At the close of the prosecution case, the appellant was placed on his defence. He elected not to adduce any evidence and await the court's decision.

12. At the conclusion of the trial, the Hon. Learned Trial Magistrate held that the prosecution had adduced adequate evidence in proof of its case and convicted the appellant on the main count. He was then sentenced to serve life imprisonment.

13. However, the appellant is aggrieved by the decision of the trial court and appeals against it on the following grounds as verbatim reproduced;

    a. That, the learned trial magistrate erred in law and facts by sentencing the appellant to a sentence term that is not only harsh but also excessive in light of the facts and circumstances of this case.

    b. That the learned trial magistrate erred in law and facts by failing to find that the appellant was NOT informed of his right to have an advocate assigned to him considering the gravity of the charges he was facing.

    c. That the learned trial magistrate erred in law and facts by failing to find that the appellant's defence was not considered as required by law.

    d. That the learned magistrate erred in law and facts by convicting the appellants on defective charge sheet.

    e. That, I pray to be supplied with a copy of the appellant court's proceedings and its judgment

    f. That, further grounds should be adduced at the hearing of this appeal.

    g. That I wish to be present during the hearing and determination of this appeal

14. However, the appeal was opposed by the respondent based on the grounds of opposition dated; 6th March 2023 which states: -

a. That the age of the victim was sufficiently proved to the required standard under section 8(1) as read with section 8(3) of the *Sexual Offences Act*. That the birth notification was produced as an exhibit proving that the victim was three (3) years old.

b. That penetration was proved under section 8(3) of the *Sexual offences Act*, through the evidence of the victim who informed court that the appellant took her to bed and smeared oil on her vagina and defiled her. This was corroborated by PW3 a doctor who examined the minor.

c. That identification of the appellant was established as he was well known to the victim.

d. That the appellant opted not to defend his case and the court proceeded to sentence him to life imprisonment.

e. That considering the tender age of the victim, a three year old child was defiled by an adult of sound mind, we implore on the court to sustain the life imprisonment sentence.

15. The appeal was disposed of vide filing of submission. The appellant submitted that the ingredients of the offence of defilement as was were set out by the High Court in the case of; Fappyton Mutuku Ngui vs Republic [2012] e KLR as proof of penetration, that penetration was by the accused, and that the complainant was a child.

16. The appellant conceded that, age of the complainant and identification were proved but argued that penetration was not proved to the required standard.

17. The appellant further submitted that, the Learned Trial Magistrate erred in relying on the medical evidence produced by PW3 Dr. Kuria on behalf of one Emily Kiargu without following the laid-out procedure under section 33 of the *Evidence Act*. Further, he was not given an opportunity to respond to the issue of production of the medical evidence by a person who was not its author and taking into consideration that he was not represented by an advocate and therefore he was greatly prejudiced.

    The appellant relied on the case of; Juma Kalio vs Republic [2001] eKLR where the Court of Appeal cited its decisions in Boniface Karere Nderi v Republic Criminal Appeal No. 39 of 1990, and Njoroge Ndungu v Republic Criminal Appeal No. 31 of 2000(unreported) and stated that where a trial court admits a report in evidence it is obliged to inform an unrepresented accused of his right to call the maker of such report for cross-examination on the contents thereof.

18. The appellant also argued that, the medical evidence was not sufficient to conclusively prove that the complainant was defiled. That when the complainant was examined she did not have any discharge, spermatozoa or pus cells and the labia majora and minor were indicated as normal female genitalia, and that the hymen was only injured and not freshly torn or broken.

19. That, the opinion of PW3 Dr. Kuria was not supported by the finding of medical examination but based on the history given by the complainant. The appellant relied on the case of; Arthur Mshila Manga vs Republic (2016) eKLR.

20. He further argued that, as the complainant was 3½ years old and of tender years, there was need for her evidence to be corroborated with other material evidence as was held in the case of R vs BaskervilleR v Baskerville [1916] 2 KB 658. That court stated that the trial court must warn itself of the dangers of relying on such evidence and can only convict the accused where the court finds that the witness was truthful.

21. That, in the present case the trial court failed to warn itself on the dangers of relying on the uncorroborated evidence of the complainant and erred in finding that the medical evidence corroborated the complainant's evidence then proceeded to convict the appellant

22. The appellant further submitted that, he was not given an opportunity to cross-examine the complainant. That the trial court after conducting a voire dire examination held that the complainant was unable to give sworn evidence, and then directed the complainant to give unsworn without being cross-examined.

23. He argued that, unlike an accused person who opts to give an unsworn testimony under section 211 of the Criminal Procedure Code, a minor witness who gives an unsworn testimony must be cross-examined as held by the Court of Appeal in the case(s) of; Kinyanjui Kimauku vs Republic [2016] eKLR and Nicholas Mutula Wambua vs Republic Msa CRA No. 373 of 2006

24. That, in the circumstances herein the directions of the trial court ordering the complainant not to be cross-examined violated his right to a fair hearing under Article 50(2) of *the Constitution* of Kenya which includes the right to challenge evidence through cross-examination.

25. On sentence, the appellant submitted that, the trial Magistrate failed to exercise its discretion in sentencing as provided for under section 216 and 329 of the Criminal Procedure Code and the Sentencing Policy Guidelines while sentencing him to life imprisonment which is the mandatory sentence under the Act. That the sentence went to the root of the case. He relied on the case of; Julius Kitsao *Manyeso vs Republic Criminal Appeal No. 12 of 2021* and European Court of Human Rights decision in; in Vinter and Others vs The United Kingdom [2016] III ECHR 317 (9th July 2013).

26. Lastly the appellant submitted that, he was charged under section 8(1) as read with section 8(3) of the Act and therefore the trial Magistrate erred in convicting and sentencing him under section 8(2) of the Act.

27. That, in the case of; Julius Kipsang Langat vs Republic (2020) eKLR the trial court sentenced the appellant to serve life imprisonment as provided for under section 8(2) for the offence of defiling a minor aged three (3) years old and sentence affirmed by the High Court on appeal. However, the Court of Appeal held that, both the trial court and the High Court misdirected themselves in passing the sentence stating that, the appellant could only be sentenced under the Penal section indicated in the charge sheet section 8(3) of the Act that provides a minimum sentence of 20 years.

28. However, the respondent in submission dated 6th March 2023 argued that the prosecution proved its case beyond reasonable doubt the elements of the defilement which are; penetration, identification of the perpetrator and the age of the victim.

29. That, penetration was proved by the evidence of the complainant who narrated how he appellant took her into the house, undressed and defiled, which evidence was corroborated by the P3 form produced by PW3 that indicated the complainant's hymen was broken at 3 O'clock and the vagina walls were inflamed.

30. Further, the appellant was positively identified by the complainant who knew him as the appellant was dating the complainant's mother. Furthermore, the complainant's age was proved by the birth notification produced in the trial court. Lastly, the appellant did not offer and defence and therefore the trial court convicted him based on the evidence on record.

31. At the conclusion of the arguments by the parties and in considering the material placed before the court, I note that the role of the 1st appellate court as held by the Court of Appeal in the case of; Okeno

vs. Republic (1972) EA 32, is to re-evaluate the evidence adduced in the trial court afresh and arrive at its own conclusion, noting that this court did not benefit from the demeanour of the witnesses.

32. In evaluating the evidence herein I find that, the appellant was convicted of the offence of defilement. The elements of the offence were settled in the case of; Agaya Roberts vs. Uganda, Criminal no. 18 of 2002, and Bassita Hussein vs. Uganda Criminal Appeal No. 35 of 1995, the Supreme Court of Uganda where court stated that, in order to constitute the offence of defilement the following must be proved: (i) the facts of the sexual intercourse (ii) the age of the victim being under 18 years (iii) participation by the accused in the alleged sexual intercourse.

33. In relation to the subject matter herein, the age of the complainant was well proved by production of the notification of birth card, which showed that the child was born on the 23rd day of November 2014. The courts have held that the age of a child can be proved by any other document other than a birth certificate. In the Ugandan case of Francis Omuroni -vs- Uganda, Court of Appeal Criminal Appeal No. 2 of 2000 it was held that the primary evidence in proof of the age of a person is; the birth certificate or a medical report and/or any other document prepared by a competent medical practitioner. The secondary evidence would include the evidence of a parent or guardian, or physical observation of the child and/or common sense. I therefore find that the element of age was adequately proved.

34. As regards penetration, the evidence of the doctor revealed that, the complainant's hymen was injured and indicated evidence of healing bruises in the labia majora. A perusal of the P3 form indicates that, there was penile penetration. The same findings are reflected in the PRC form which was also produced in evidence.

35. I further note that the complainant testified that the appellant whom she referred to as "Maina", removed his trouser and shirt and then he removed her trouser and he put her on the seat, then pressed her private parts (pointing to her vagina). That he put her in bed and put on her "chuchu" "kitu yake" into her private parts. That his thing was like a pen and it was painful. That he wiped her with "kitamba" and then oiled her again and let her go home.

36. Furthermore, PW2 Monica testified that, the child went to her mother's place and upon return PW2 Monica noticed that her trouser was not zipped and was walking with legs apart.

37. Based on the definition of penetration under the Act which include partial or complete insertion of the genital organs of a person into the genital organs of another person. I find and hold that penetration was proved. The trial court analysed the evidence in relation to the element of penetration well. As such penetration was proved.

38. The final issue to determine is whether the appellant committed the offence. In that regard, it suffices to note that, the appellant was staying with the complainant's biological mother whom the appellant referred to as his lover. That they were staying in the same plot with the complainant, albeit in different houses. Therefore, the complainant knew the appellant very well and could not mistake him for anyone else. The appellant has not rebutted the evidence to the effect that and/or that, the complainant knew him well.

39. Indeed, the appellant has not advanced any reason why the child of such tender years would implicate him in the commission of the offence if he was not involved.

40. Further PW2 Monica testified that the child told her that Maina had touched her; that is; "alinifanya katikati ya mguu". That when PW2 Monica checked the complainant she realized her private parts were swollen and had oil. The evidence of PW2 Monica confirms that, the child clearly stated that, it was the appellant who defiled her.

41. PW3 Dr. Benjamin Kuria Gachure testified that, the complainant gave a history of the defilement by the appellant when she was presented before the doctor for medical examination. In fact, it is clearly stated in the P3 form that, the perpetrator of the defilement was well known to the complainant. That, he was her mother's boyfriend.

42. Pursuant to the evidence of the above witnesses all facts point to the appellant as the one who was with the complainant in the house before the incident and the most probable perpetrator.

43. It suffices to reiterate that; the appellant did not rebut any or the entire prosecution evidence that held him to blame for the offence. That when he was explained to the various ways of offering his defence, the record of the trial court indicates that he stated "I will not testify. I will wait for the court's judgment. I will not be calling any witnesses. I will not also put any submissions."

44. In the given circumstances, I find that, the prosecution proved the case beyond reasonable doubt and the prosecution evidence linking the appellant to the commission of the crime was not rebutted. As such the finding on conviction is sound and there is no justifiable reason to interfere with it.

45. As regards the sentence I note that, the trial court meted out a lawful sentence provided for under the law. Therefore, the issue of it being harsh does not arise. The section under which the appellant was charged explicitly states the sentence for the offence and proper sentence was meted out. It would not be proper to mete out any other unlawful sentence even if section 8(2) was not indicated in the charge sheet.

46. In the same vein the ground of appeal to the effect that the defence advanced was not considered does not arise as there was none.

47. Finally, the allegation of charges having been defective has no substance as I note that, the charges and particulars thereof as framed comply fully with the requirements under section 134 of the Criminal Procedure Code (Cap 75) Laws of Kenya.

48. The upshot of the afore is that, the appeal is dismissed in its entirety. It is so ordered.

DATED, DELIVERED AND SIGNED THIS 25TH DAY SEPTEMBER OF 2024.

GRACE L. NZIOKA

JUDGE

In the presence of:

The appellant in person virtually

Mr. Ndiema for the respondent

Mr. Komen: Court Assistant